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No. 07-652

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In The

Supreme Court of the United States

UNITED SENIORS ASSOCIATION, INC.,
AS A PRIVATE ATTORNEY GENERAL,

Petitioner,

v.

PHILIP MORRIS USA, R.J. REYNOLDS TOBACCO COMPANY, BROWN & WILLIAMSON TOBACCO CORPORATION, INDIVIDUALLY AND AS THE SUCCESSOR TO THE AMERICAN TOBACCO COMPANY, LORILLARD TOBACCO COMPANY, AND LIGGETT GROUP, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

CHRISTOPHER WELD, JR.
KEVIN T. PETERS
RAYMOND P. AUSROTAS
TODD & WELD LLP
28 State Street, 31st Floor
Boston, MA 02109
(617) 720-2626

ROBERT J. CYNKAR*
JONATHAN W. CUNEO
R. BRENT WALTON
CUNEO GILBERT & LADUCA, LLP
507 C Street, NE
Washington, DC 20002
(202) 587-5063

**Counsel of Record*

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

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SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Pursuant to Rule 15.8 of this Court, Petitioner, United Seniors Association, Inc., respectfully submits this Supplemental Brief in support of its Petition for Writ of Certiorari filed on November 14, 2007 (the "Petition").

GROUNDS FOR FILING A SUPPLEMENTAL BRIEF

On November 27, 2007, thirteen days after our Petition was filed, the United States Court of Appeals for the Eighth Circuit filed its decision in *Stalley v. Catholic Health Initiatives*, No. 06-3884 (8th Cir. Nov. 27, 2007) (Supp.App. 1a-22a.). Our Petition advised the Court that over 50 cases, including *Stalley*, were pending in the lower federal courts raising the same issue presented in this case – whether the private right of action enacted to enforce the Medicare as Secondary Payer ("MSP") statute is a *qui tam* provision giving any person standing to sue on behalf of Medicare to recover its expenditures from the responsible primary payer. *See* Pet. 2. We noted that these cases were marching in lockstep with the First Circuit's analysis here, and that it was unlikely that another Circuit might hold differently. *Id.* 36. With the *Stalley* decision, another Circuit now has ruled and followed the First Circuit to conclude that the MSP private action is not a *qui tam* provision.

The *Stalley* opinion confirms the disarray of the lower courts concerning the meaning of the MSP's private action. It employs confused and contradictory analyses unanchored to the statutory text or this Court's precedents to hinder effective administration of a critical federal program. Moreover, *Stalley* is yet another example of the widespread litigation that is highly unlikely to further sharpen this issue for this Court's consideration, churning on while the taxpayers' Medicare dollars drain away to private insurers. Thus *Stalley* confirms the need for the Court to grant our Petition and resolve this issue.

As *Stalley* is a new case, not available at the time of our last filing, yet very relevant to the Court's consideration of our Petition, it is an appropriate subject for this Supplemental Brief under Rule 15.8. Additionally, Respondents have waived their right to file a brief in opposition, and so we cannot anticipate that we will have a reply brief by which to bring *Stalley* to the Court's attention.

ARGUMENT

Stalley is an MSP private action brought under 42 U.S.C. §1395y(b)(3)(A) to recover Medicare's expenditures for the medical care required by Medicare beneficiaries as a result of the alleged misconduct of the hospitals in which they were patients. Supp.App. 3a-5a. The Eighth Circuit affirmed dismissal of the case on the ground that the MSP private

action did not authorize a *qui tam* suit, and that the plaintiff otherwise had suffered no injury-in-fact to give him standing. *Id.* 3a.

To reach this conclusion, the Eighth Circuit reasoned that, since the statute created a "*private cause of action*," it did not create a *qui tam* action to "vindicate public rights." *Id.* 9a (emphasis in original). The court pointed to the dissimilarities between the MSP private action and the *qui tam* provisions of the False Claims Act ("FCA") as further support for this notion. *Id.* While the Eighth Circuit acknowledged "language in some circuit-level decisions indicating that the private plaintiff can assert the government's rights under §1395y(b)(3)(A)," it nevertheless concluded "that the statute actually allows a private plaintiff to assert his own rights, not those of the government." *Id.* 10a-11a (citing *Glover v. Liggett Group, Inc.*, 459 F.3d 1304, 1307 (11th Cir. 2006) and *Manning v. Utilities Mutual Ins. Co.*, 254 F.3d 387, 394 (2d Cir. 2001)).

The Eighth Circuit then addressed the key question: if an MSP private action is not a *qui tam*, then who *does* have standing to bring such a case? As the *Stalley* court admitted, if no one could bring an MSP private action, "that would be a powerful argument that such an interpretation [that it is not a *qui tam*] was wrong." Supp.App. 12a.[1] The court held that

[1] The Eighth Circuit pointed out that the *Stalley* appellees "decline[d]" to give an example of who could bring an MSP

(Continued on following page)

the MSP private action allows a Medicare beneficiary "to sue to vindicate his or her own contractual and tort interests." *Id.* 19a. In the Eighth Circuit's view, "Congress contemplated that Medicare beneficiaries could recover double damages to vindicate their private rights when their primary payers fail to live up to their obligations, even if Medicare has made a conditional payment of the beneficiaries' expenses." *Id.* 20a. While this reading relies on an injury to the Medicare beneficiary – which has no necessary relation to any Medicare expenditure – to provide standing, the court "anticipate[d] that a portion of the beneficiary's recovery would be paid to reimburse Medicare." *Id.* 21a.

Stalley underscores the radical departure of the lower federal courts from this Court's precedents governing standing in *qui tam* cases described in our Petition. Indeed, *Stalley* illustrates that, if anything, the lower courts' apparent analytical challenges in interpreting MSP only promise to become more acute, and threaten to confuse the most fundamental norms of statutory construction and standing to sue.

1. To find that the MSP private action is not a *qui tam* provision, the Eighth Circuit embraced the First Circuit's conclusion in this case that the

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private action to recover Medicare expenses if it is not a *qui tam* action, because they believed, contrary to the court's view, that they "need not even delve into this sort of speculation about the MSP statute's possible uses." Supp.App. 12a.

dissimilarity between the FCA and MSP indicates that the MSP private action is not a *qui tam* suit. *Id.* 9a (citing *United Seniors Ass'n v. Philip Morris USA*, 500 F.3d 19, 24-25 (1st Cir. 2007)). In so doing, the Eighth Circuit, like the First here, placed itself directly at odds with this Court's long-established precedents construing *qui tam* provisions. *See* Pet. 20-26.

In addition, the Eighth Circuit reasoned that, because the MSP refers to the private cause of action as just that, "a private cause of action," §1395y(b)(3)(A), it authorizes suits by individuals "*qua* individuals," not as private attorneys general. Supp.App. 9a. Yet fashioning such a dichotomy between "private" and "public" to conclude MSP does not create a *qui tam* action is at odds with both this Court's understanding of the nature of a *qui tam* action and the words Congress has used in the past to create them.

Contrary to *Stalley's* sharp divide between "private" and "public," our jurisprudence, lead by this Court's precedents, has long understood that the private *qui tam* plaintiff is a "person who mixes private and public features in the adjudicative arena." W. Rubenstein, *On What A "Private Attorney General" Is – And Why It Matters*, 57 VAND.L.REV. 2129, 2131 (2004). *See also* J. Gold, *Legal Duties That Qui Tam Relators and Their Counsel Owe to the Government*, 20 GEO.J.LEGAL ETHICS 629, 631 (2007) ("[T]he relator serves the public interest as well as his own pecuniary interest."). "A *qui tam* suit . . . involves a combination of two distinct interests; one of which

is public, the other private." Note, *The History and Development of Qui Tam*, 1972 WASH.U.L.Q. 81, 83. Thus, this Court has pointed out that the *qui tam* plaintiff is not simply an agent of the government, advancing solely the public interest, but has his own, distinctive private interest in the lawsuit. *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 772 (2000).

Reflecting this dual character of *qui tam*, Congress has used variations of the phrase "private cause of action" without hesitation to create *qui tam* actions. The FCA itself titles its *qui tam* as "Actions by private persons." 31 U.S.C. §3730(b). Accordingly, the FCA "grant[s] any private 'person' the right to bring a civil action under the Act." *United States ex rel. Williams v. NEC Corp.*, 931 F.2d 1493, 1498 (11th Cir. 1991). *See also, e.g.*, 17 U.S.C. §1326(b) (*qui tam* suit to recover penalty for false marking titled "Suit by private persons").

Beyond the fact that the simple use of "private cause of action" cannot have the significance with which the Eighth Circuit invested it, the MSP itself, in the same sentence in which the phrase appears, describes what this private action is for. It is an action "for damages . . . in the case of a primary plan which fails to provide for primary payment (or appropriate reimbursement) in accordance with paragraphs (1) and (2)(A) [the basic secondary-payer rules]." §1395y(b)(3)(A). Congress gave no other role to this action. It created a private action with the sole purpose of recovering Medicare dollars, that is, to

remedy "an economic wrong done to the government." *Manning*, 254 F.3d at 394. In the MSP private action, Congress created a classic *qui tam* to authorize private actions to recover government money. The Eighth Circuit's narrow reading of the text achieves a result clearly at odds with the congressional design, like that of the First Circuit here. *See* Pet. 20-21.

Stalley holds that the MSP private action does not allow a private person to "vindicate public rights," Supp.App. 9a, and that an MSP private plaintiff is allowed only "to assert his own rights, not those of the government," *id.* 11a, yet strains to squeeze some secondary benefit to Medicare out of this wholly private affair with its "anticipation that a portion of the beneficiary's recovery would be paid to reimburse Medicare." *Id.* 21a. Besides failing to point to any support for this notion that Congress chose such an oblique and uncertain route to recover Medicare money instead of following the familiar *qui tam* path, the *Stalley* court fails to explain why Congress needed to enact the MSP private action at all if it was designed as *Stalley* contends. Medicare beneficiaries already have state causes of action to vindicate their private claims. In a tort action, the plaintiff would recover the medical expenses caused by the tort, including those paid by Medicare. *See* RESTATEMENT (SECOND) OF TORTS §920A(2). Medicare could then recover its money from the prevailing beneficiary. *See* §1395y(b)(2)(B)(iii); 42 C.F.R. §§411.22(a), 411.24(g). Thus existing state law and MSP without the private

action does precisely what *Stalley* says Congress added the private action to do.

2. To avoid a straightforward reading of MSP, *Stalley* cites three state cases as the model Congress supposedly used to write the private action – an action, according to the Eighth Circuit, by which "a Medicare beneficiary could sue his private insurer and recover his expenses incurred, even if those expenses had already been paid by Medicare." Supp.App. 18a. But in each of these cases, both Medicare and a private insurer had paid their shares of a Medicare beneficiary's expenses; there was no claim of improper conduct by the private insurer. Rather, the question in each case was whether the terms of the private insurance contract required the insurer to pay the beneficiary all the medical expenses incurred, including those paid for by Medicare. The plaintiff was suing for an amount equivalent to Medicare's expenditure to keep for itself, not to return to Medicare. *See Holmes v. California State Automobile Ass'n*, 135 Cal.App.3d 635 (Cal.Ct.App. 1982); *Black v. American Bankers Ins. Co.*, 478 S.W.2d 434 (Tex. 1972); *Niles v. American Bankers Ins. Co.*, 229 So.2d 435 (La.Ct.App. 1969).

In these cases, the plaintiff's injury-in-fact arose from a contract right, and that injury-in-fact was not used to justify standing to remedy a different injury to a third party, which is the gloss *Stalley* has put on the MSP private action. Moreover, in the context of a Medicare beneficiary injured by a tort, the MSP defendant is not the beneficiary's insurer, but the

liability insurer of the tortfeasor (or the tortfeasor itself if self-insured). *See* 54 Fed.Reg. 41,716, 41,727 (Oct. 11, 1989) ("Liability insurance . . . is a contractual arrangement between a policyholder (i.e. the tortfeasor) and an insurer."). Where a liability insurer is the primary payer, an MSP action could never be premised on a contract right *of a Medicare beneficiary*. Thus *Stalley's* interpretation would leave a major part of MSP beyond the reach of the MSP private action, a judicially fashioned barrier to MSP enforcement finding no basis in the statute, its legislative history, or the purpose of the MSP regime.

3. *Stalley's* most egregious departure from this Court's precedents and MSP's text is its holding that a Medicare beneficiary has standing to bring an MSP private action to remedy Medicare's economic injury based on the quite different personal injury to that Medicare beneficiary. Supp.App. 18a-19a. This is pure judicial invention. *Stalley* points to nothing in the statute that even comes close to saying this.

This contrivance runs directly contrary to this Court's most well-established precedents governing standing. "The Art. III judicial power exists only to redress or otherwise to protect against injury *to the complaining party*." *Warth v. Seldin*, 422 U.S. 490, 499 (1975) (emphasis added). Such "buddy-breathing" on an injury suffered by a beneficiary to provide standing to remedy Medicare's different injury simply cannot pass constitutional muster, even recognizing the power of Congress to establish causes of action:

> Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before. . . . In exercising this power, however, Congress must at the very least identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit.
>
> . . .
>
> While it does not matter how many persons have been injured by the challenged action, *the party bringing suit must show that the action injures him in a concrete and personal way.*

Lujan v. Defenders of Wildlife, 504 U.S. 555, 580-81 (1992) (Kennedy, J., concurring in part and concurring in the judgment) (emphasis added). *See also United States ex rel. Milam v. University of Texas M.D. Anderson Cancer Center*, 961 F.2d 46, 49 (4th Cir. 1992) ("The government, and not the relator, must have suffered the 'injury-in-fact' required for Article III standing.").

The sole cognizable injury-in-fact that can establish standing to enforce MSP, whether by the government or a private party, is the economic injury to Medicare caused by it paying a medical expense that is the responsibility of another insurer. Contrary to *Stalley* and the First Circuit here, a Medicare beneficiary can never, by definition, suffer this injury. Indeed, as to the costs paid by Medicare, the beneficiary suffers no injury of any kind. The only way a

statute authorizing a "private cause of action" to recover Medicare's money can be constitutional is by following the path set out in *Vermont Agency* – the statute must effect a partial assignment of Medicare's claim. 529 U.S. at 773. This, the MSP private action does. Nothing in the statute compels a contrary reading that would leave that provision a nullity.

4. *Stalley* also illustrates the analytical churning in the lower courts concerning MSP that has reached such a level that courts apparently sharing a hostility to MSP are advancing mutually contradictory explanations to defeat MSP enforcement. For example, the district court in this case adopted the policy-driven reasoning of the Eleventh Circuit in *Glover* to hold that a responsibility to pay Medicare must be established before an MSP action can be brought. *See* Pet. 18a. (The First Circuit affirmed dismissal solely on standing.) The district court (and the Eleventh Circuit) was concerned that the MSP action would disrupt "the allocation of jurisdiction between federal and state courts . . . 'by creating a federal forum to litigate any state tort claim in which a business entity allegedly injured a Medicare beneficiary.'" Pet.App. 26a-27a (quoting *Glover*, 459 F.3d at 1309). Yet the Eighth Circuit in *Stalley* – in order to claim some use for the MSP private action if it is not a *qui tam* – holds that this is precisely what Congress did – it "federalized" state torts to allow a Medicare beneficiary's private injury-in-fact to be used to remedy a distinct injury to Medicare.

Such contradictions manifest judicial decision-making that can only confuse congressional law-writing, agency administration of a major federal program, and legal advocacy. This Court's resolution of the question of standing under the MSP private action is sorely needed.

CONCLUSION

For the foregoing reasons and those set out in our Petition, this Court should issue a writ of certiorari to review the decision of the First Circuit.

Respectfully submitted,

CHRISTOPHER WELD, JR.
KEVIN T. PETERS
RAYMOND P. AUSROTAS
TODD & WELD LLP
28 State Street, 31st Floor
Boston, MA 02109
(617) 720-2626

ROBERT J. CYNKAR*
JONATHAN W. CUNEO
R. BRENT WALTON
CUNEO GILBERT & LADUCA, LLP
507 C Street, NE
Washington, DC 20002
(202) 587-5063

*Counsel of Record

Counsel for Petitioner

December 4, 2007

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 06-3884

Douglas B. Stalley, on behalf of the United States of America,

Plaintiff/Appellant,

v.

Catholic Health Initiatives, a Colorado Corporation; Bergen Mercy Foundation, Inc., a Nebraska corporation; Alegent Health-Bergen Mercy Health System, a Nebraska corporation; Alegent Health, a Nebraska corporation; Preferred Professional Insurance Company, a Nebraska corporation; Advocate Insurance Resources SPC, a Cayman Islands company,

Defendants/Appellees.

No. 06-4121

Appeals from the United States District Court for the Eastern District of Arkansas.

Douglas B. Stalley, on behalf of the United States of America,

Plaintiff/Appellant,

v.

Triad Hospitals, LLC, a Delaware limited liability company; Triad Hospitals, Inc., a Delaware Corporation; Triad Hospitals Holdings, Inc., a Delaware corporation; Parthenor Insurance Company, Limited, a Bermuda company; Health Midwest Insurance Company, Limited, a Cayman Islands company; Health Care Indemnity, Inc., a Colorado corporation,

Defendants/Appellees.

Submitted: May 17, 2007
Filed: November 27, 2007

Before WOLLMAN, BRIGHT, and JOHN R. GIBSON, Circuit Judges.

JOHN R. GIBSON, Circuit Judge.

In these two consolidated appeals we consider whether a plaintiff who has alleged no injury to himself has standing to bring suit under the Medicare Secondary Payer statute, 42 U.S.C. § 1395y(b)(3)(A). Because we conclude that the suit authorized by the statute is a private cause of action, which requires the plaintiff to have standing in his own right, rather than a *qui tam* statute, which allows the plaintiff to assert injury to the United States, we affirm the district courts'[1] dismissal of these cases.

Both of these cases were filed by the same plaintiff, Douglas B. Stalley, who has also filed many similar cases around the country.[2] Stalley alleges that the defendants Catholic Health Initiatives[3] and Triad Hospitals, Inc.[4] are medical care providers

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[1] The district judge in *Stalley v. Catholic Health Initiatives*, No. 06-3884, was the late Honorable George Howard, Jr., United States District Judge for the Eastern District of Arkansas. The district judge in *Stalley v. Triad Hospitals*, No. 06-4121, was the Honorable William R. Wilson, United States District Judge for the Eastern District of Arkansas.

[2] Erin Brockovich has filed a number of similar cases in California.

[3] Stalley also lists Bergen Mercy Foundation, Inc., Alegent Health-Bergen Mercy Health System, Alegent Health as provider plaintiffs, but refers to these together with Catholic Health Initiatives as "CHI."

[4] Stalley also lists Triad Hospitals LLC and Triad Hospital Holdings, Inc. as provider plaintiffs, but refers to these defendants together with Triad Hospitals, Inc. as "Triad."

participating in the Medicare program, who partly self-insure for malpractice. He alleges that the insurance company defendants[5] were subsidiaries or sister companies to the provider defendants and wrote malpractice insurance for the provider defendants.

Stalley's substantive allegations are substantially the same in the two suits before us:

> On numerous occasions, [the provider defendants] by and through [their] employees and agents, caused harm to Medicare recipients who were patients in [the defendants'] hospitals, thereby triggering legal obligation on the part of [the hospital defendants] and the other primary payer Defendants herein to pay for any consequential medical service, treatment, or medication. Nevertheless, [the provider defendants] provided medical services, treatment, and medication to such Medicare recipients who were harmed by [the provider defendants'] own conduct, and thereafter received reimbursement from Medicare for treating those injured Medicare recipients.

The complaints allege that the insurer defendants knew that the provider defendants had injured the

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[5] In the Catholic Health Initiatives case, the insurer defendants are Preferred Professional Insurance Company and Advocate Insurance Resources, SPC. In the Triad case, the insurer defendants are Parthenon Insurance Company, Limited, Health Midwest Insurance Company, Limited, and Health Care Indemnity, Inc.

Medicare beneficiaries and that the insurer defendants were liable as primary payers, yet the insurer defendants did not reimburse Medicare for the costs of treatment. The complaint does not allege that Stalley was either a Medicare beneficiary or a patient of the defendants or that he was injured by the defendants in any way. For that matter, the complaint does not identify any particular person who was injured by the defendants at any particular time.

The defendants in both cases moved to dismiss for lack of jurisdiction and for failure to state a claim. Both district courts granted the motion. The district court in the *Catholic Health Initiatives* case ruled first, holding that Stalley lacked constitutional standing to bring the suit because he had not alleged any injury to himself. *Stalley v. Catholic Health Initiatives,* 458 F. Supp. 2d 958, 962-63 (E.D. Ark. 2006). Stalley contended that he had standing because he asserted injury to the United States and the Medicare Secondary Payer statute was a *qui tam* statute that authorized him to bring suit as relator for the United States. The district court examined the Medicare Secondary Payer statute and found no support for the notion that it was a *qui tam* statute. *Id.* at 963. Accordingly, the court dismissed Stalley's suit under Fed. R. Civ. P. 12(b)(1) for lack of standing. Alternatively, the court held that Stalley had not alleged a cause of action under 42 U.S.C. § 1395y(b)(3)(A) because he had not alleged that the provider defendants' liability had been "demonstrated," and the duty of the primary insurer to pay or to reimburse

Medicare did not arise until the tortfeasor's liability has been "demonstrated" by judgment or other comparable means. *Id.* at 964 (relying on *Glover v. Liggett Group, Inc.*, 459 F.3d 1304, 1309 (11th Cir. 2006)). The district court in *Triad* relied on Judge Howard's conclusion in *Catholic Health Initiatives* that § 1395y(b)(3)(A) is not a *qui tam* statute and that Stalley therefore lacked standing to sue.[6]

The standard of review of a district court's decision under Fed. R. Civ. P. 12(b)(1) depends on whether the district court resolved a facial attack or a factual attack on subject matter jurisdiction. *Osborn v. United States*, 918 F.2d 724, 729 n. 6 (8th Cir. 1990). If, as here, the district court addressed a deficiency in the pleadings, our standard of review is the same standard we apply in Rule 12(b)(6) cases. *Mattes v. ABC Plastics, Inc.*, 323 F.3d 695, 697-98 (8th Cir. 2003). We accept as true all factual allegations in the complaint, giving no effect to conclusory allegations of law. *Id.* at 698. The plaintiff must assert facts that affirmatively and plausibly suggest that the

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[6] An incomplete list of other district court cases dismissing Stalley's or Brockovich's § 1395y(b)(3)(A) claims for lack of standing includes *Stalley v. Orlando Regional Healthcare Systems, Inc.*, No. 06-1824 (M.D. Fla. Jan. 22, 2007); *Stalley v. Methodist Healthcare*, No. 06-2605 (W.D. Tenn. Dec. 22, 2006); *Brockovich v. Loma Linda University Medical Center*, No. 06-0834 (C.D. Cal. Nov. 15, 2006); *Brockovich v. Healthplus Corp.*, No. 06-5660 (C.D. Cal. Nov. 15, 2006); *Brockovich v. Scripps Health*, No. 06-1569 (S.D. Cal. Nov. 7, 2006). The defendants advise us that no court has held that Stalley or Brockovich have standing to assert these claims.

pleader has the right he claims (here, the right to jurisdiction), rather than facts that are merely consistent with such a right. *See Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1964-66 (2007).

The party invoking federal jurisdiction has the burden of establishing that he has standing to assert the claim. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). Standing consists of three elements: the plaintiff must have suffered an injury in fact; there must be a causal connection between that injury and the conduct complained of; and it must be likely that the injury would be redressed by a remedy the court could order. *Id.* at 560-61. "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim." *Id.* at 561 (internal quotation marks omitted).

Stalley does not contend that he himself has sustained any injury in fact. Instead, he contends that the Medicare Secondary Payer statute is a *qui tam*[7] statute. A *qui tam* statute effectively assigns part of the government's interest to a relator so that the relator has standing to assert an injury suffered

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[7] "*Qui tam* is short for the Latin phrase *qui tam pro domino rege quam pro se ipso in hac parte sequitur*, which means 'who pursues this action on our Lord the King's behalf as well as his own.'" *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 768 n. 1 (2000).

by the government. *See Vt. Agency of Nat. Res. v. United States ex rel. Stevens,* 529 U.S. 765, 772-74 (2000). ("The [False Claims Act] can reasonably be regarded as effecting a partial assignment of the Government's damages claim. . . . We conclude, therefore, that the United States' injury in fact suffices to confer standing on respondent Stevens.") *Qui tam* actions developed around the end of the thirteenth century as a way for individuals who had suffered harm to avail themselves of the royal courts by pleading a harm to the King as well as to themselves. *Id.* at 774-75. Well before American independence, the action evolved into the modern form in which informers who had not suffered harm personally, but who knew of harm done to the government, were authorized by statute to sue the wrongdoer on the government's behalf and to retain a portion of the damages awarded the government as a "bounty" or reward for bringing the wrongdoing to light. *Id.* at 775-77. "There presently is no common-law right to bring a *qui tam* action, which is strictly a creature of statute." *United Seniors Ass'n v. Philip Morris USA,* 500 F.3d 19, 23 (1st Cir. 2007); *accord United States ex rel. Burnette v. Driving Hawk,* 587 F.2d 23, 24 (8th Cir. 1978). The best known *qui tam* statute today is the False Claims Act, 31 U.S.C. §§ 3729-3732, which conferred standing on the plaintiff in *Vermont Agency of Natural Resources,* 529 U.S. at 778.

The plain language of § 1395y(b)(3)(A) says, "There is established a *private cause of action* for damages . . . " (emphasis added). A "private" right is

different from a public right, *see Black's Law Dictionary*, "Right" (8th ed. 2004) (private right is defined as "A personal right, as opposed to a right of the public or the state."), and *qui tam* cases exist to vindicate public rights. Thus, the Medicare Secondary Payer statute purports to give a substantive right to individuals *qua* individuals, not as private attorneys general or assignees of a public right. In contrast, the False Claims Act *qui tam* provision authorizes a private person to bring a civil action "for the person and for the United States Government. The action shall be brought in the name of the Government." 31 U.S.C. § 3730(b). Moreover, the Medicare Secondary Payer statute lacks any provisions giving the government the right to control the action, such as the right to dismiss the action, the right to veto a dismissal or settlement, and the right to review the complaint *in camera* before the relator serves the complaint on the defendant. Again, in contrast, the False Claims Act has extensive provisions giving the government these rights and more. *See* 31 U.S.C. § 3730. The absence of procedural safeguards giving the executive branch control over the prosecution of the action and the proceeds is powerful evidence that Congress did not mean § 1395y(b)(3)(A) to function as a *qui tam* statute. *See United Seniors Ass'n*, 500 F.3d at 24-25 (affirming dismissal for lack of standing of Medicare Secondary Payer private action by plaintiff who had no personal injury); *In re Guidant Corp. Implantable Defibrillators Prods. Liability Lit.*, 484 F. Supp. 2d 973, 980-81 (D. Minn. 2007) (dismissing Medicare Secondary Payer private action for lack

of standing), *reconsidered on different grounds,* 2007 WL 2028137 (D. Minn. May 9, 2007).

Stalley relies on a statement in *Mason v. American Tobacco Co.,* 212 F.Supp.2d 88, 94 (E.D.N.Y. 2002), *aff'd*, 346 F.3d 36 (2d Cir. 2003), that the private right of action provided by § 1395y(b)(3)(A) is "similar to a *qui tam* action where anyone can bring a claim on behalf of the United States government and receive a bounty." *See also Manning v. Utils. Mut. Ins. Co.,* 254 F.3d 387, 394 (2d Cir. 2001) (referring to the Medicare Secondary Payer statute as creating "private attorneys general"). The aspects of the Medicare Secondary Payer statute that are similar to a *qui tam* provision are that (1) it is based on the informer principle, in which the government relies on private persons with superior knowledge to discover the government's claim; (2) it increases the damages payable in order to motivate a private party to take action; and (3) the government expects to recoup part of the private party's recovery. In *Manning,* the Second Circuit relied on these kinds of similarities to conclude that the False Claims Act provided the most analogous statute of limitations to apply to § 1395y(b)(3)(A) claims. 254 F.3d at 394.

Even though the private right of action under § 1395y(b)(3)(A) shares these characteristics of a *qui tam* statute, it may not be a *qui tam* statute if Congress intended the plaintiff to act as a private plaintiff, asserting his own injury, rather than as a relator, asserting the government's injury. Despite language in some circuit-level decisions indicating that the

private plaintiff can assert the government's rights under § 1395y(b)(3)(A), *Glover v. Liggett Group, Inc.*, 459 F.3d 1304, 1307 (11th Cir. 2006) ("The MSP also creates a private right of action with double recovery to encourage private parties who are aware of non-payment by primary plans to bring actions *to enforce Medicare's rights.*") (emphasis added); *Manning,* 254 F.3d at 394 (stating that Medicare Secondary Payer statute allows individual citizens "to sue in order to right an economic wrong done to the government"), we conclude that the statute actually allows a private plaintiff to assert his own rights, not those of the government. *See Frazer v. CNA Ins. Co.,* 374 F. Supp. 2d 1067, 1083 (N.D. Ala. 2005) ("[T]he MSPA does not create a cause of action which would permit a non-Medicare eligible worker's compensation claimant to bring such an action . . . ").

Stalley argues that the statute cannot be read to contemplate that only a private party who was actually injured can assert the private right of action. Stalley argues that such a reading is impossible because no private plaintiff would ever have an injury which would both (1) be a cognizable injury for which the plaintiff could recover and (2) lead to a recovery which the government could recoup. Thus, Stalley says that the only way the "private right of action" can help the government recoup money from primary payers is if it functions as a *qui tam* statute empowering a private person to assert the government's rights, rather than his own rights. Therefore, according to Stalley, a volunteer like himself, who has no

relationship with the primary payer and has suffered no injury, can sue under the private right of action and recover double damages for the injury to the government. Catholic Health Initiatives' brief declines to identify a case in which the private right of action would be enforceable by an individual and lead to recoupment of Medicare expenses by the government; Catholic Health Initiatives tells us that we "need not even delve into this sort of speculation about the MSP statute's possible uses," but if there were truly no way that the private right of action would ever have any effect under Catholic Health Initiatives' interpretation, that would be a powerful argument that such an interpretation was wrong. To understand whether Stalley's argument is correct, we have to determine how the Medicare Secondary Payer statute as a whole was meant to work and how the private right of action fits within that framework.

Medicare is a federal program that provides health insurance for the elderly, the disabled, and renal patients. *Blue Cross & Blue Shield of Tex., Inc. v. Shalala*, 995 F.2d 70, 71 (5th Cir. 1993). In order to control the cost of Medicare, in 1980 Congress passed the Medicare Secondary Payer statute, 42 U.S.C. § 1395y(b), which provides generally that Medicare insurance is secondary to employer-provided group health insurance covering Medicare beneficiaries and that Medicare will not be liable for expenses which the private insurer ought to pay. *See* 1395y(b)(2). The statute provides that the private insurers cannot draw their policies to make an end run around the

statute by excluding expenses that would be covered by Medicare if the person did not have group health insurance. § 1395y(b)(1). In addition to expenses covered by group health insurance, the statute also disclaims liability for expenses that should be paid under a workmen's compensation plan or under an automobile, liability, or no fault insurance policy, including a self-insurance plan. § 1395y(b)(2)(A). *See generally* Harvey L. McCormick, *Medicare and Medicaid Claims and Procedures* § 1:67 (Aug. 2007). Even though Medicare is not ultimately liable for these excluded expenses, the statute permits Medicare to pay those expenses up front, conditionally, and to require the liable insurer or other primary payer to reimburse Medicare for the moneys advanced. § 1395y(b)(2)(B)(i). The statute authorizes the government to sue any primary payer that has failed to reimburse Medicare for such conditional payments, and to collect double damages in such a suit. § 1395y(b)(2)(B)(iii). The government can also sue anyone that received payment from the primary payer with respect to expenses covered under Medicare, including the beneficiary himself, should he collect the payment but fail to reimburse the government. *Id.*; 42 C.F.R. § 411.24(g) (government has right of action against beneficiary that has received primary payment); *United States v. Sosnowski,* 822 F. Supp. 570, 574 (W.D. Wis. 1993) (granting government recovery from beneficiary from settlement with primary payer). The statute provides that the United States is subrogated to the rights of the Medicare beneficiaries against their insurer, to the extent of

Medicare payments the government has made for the beneficiaries' expenses. § 1395y(b)(2)(B)(iv).

Congress added a private right of action to the Medicare Secondary Payer statute in 1986. Pub. L. No. 99-509, § 9319, 100 Stat. 1874 (1986) (codified as amended at 42 U.S.C. § 1395y(b)(3)(A)). Section 1395y(b)(3)(A) grants the Medicare beneficiary a private right of action for double damages against an insurer or other primary payer that fails to pay the amounts it owes on the insured's behalf. The parties do not point us to any legislative history explaining the purpose of the private right of action, nor have we found any legislative history directly explaining how the private right was meant to work. *See* H.R. Conf. Rpt. No. 99-1012, at 321 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3868, 3966 (merely stating that the private right of action is "to enforce the provision for the aged"); S. Rpt. No. 99-348, at 140 (1986) (stating that obligation of primary payers "would be enforceable by private action or by the Federal Government"). Courts considering the provision have generally agreed that the apparent purpose of the statute is to help the government recover conditional payments from insurers or other primary payers. *See, e.g., United Seniors*, 500 F.3d at 21-22 ("To facilitate recovery of these conditional payments, the MSP . . . (iii) creates a private cause of action with double recovery to encourage private parties to bring actions to enforce Medicare's rights.") (citation omitted); *Manning*, 254 F.3d at 396-97 & n. 8 ("The history of the MSP legislation is consistent with our view that

the private right of action was created to save money for the Medicare system."); *Frazer*, 374 F. Supp. 2d at 1077 ("The legislation's incentive to bring a private lawsuit is clearly based in turn upon the subrogation right of the government to obtain a portion of the recovery. The recovery of costs by Medicare is the primary purpose of the MSP."); *see also Harris Corp. v. Humana Health Ins. Co.*, 253 F.3d 598, 606 (11th Cir. 2001) (per curiam) ("A private cause of action for double damages . . . serves Congress' interest in the fiscal integrity of the Medicare program by deterring private insurers primary to Medicare under the statute from attempting to lay medical costs at the government's doorstep."). This is consistent with inclusion of the provision in The Omnibus Budget Reconciliation Act of 1986, which was intended to reduce government spending. *See* Statement by President of the United States, 22 Weekly Compilation of Presidential Documents 1421 (Oct. 27, 1986), *reprinted in* 1986 U.S.C.C.A.N. 4073-74. Additionally, as the Second Circuit pointed out in *Manning,* 254 F.3d at 397 n. 8, when Senator David Durenburger introduced the President's Medicare proposals for 1986, which included the private right of action, he referred to the proposals as "health care cost reduction proposals." 132 Cong. Rec. 21935 (Aug. 15, 1986).

The thinking behind the statute is apparently that (1) the beneficiary can be expected to be more aware than the government of whether other entities may be responsible to pay his expenses; (2) without the double damages, the beneficiary might not be

motivated to take arms against a recalcitrant insurer because Medicare may have already paid the expenses and the beneficiary would have nothing to gain by pursuing the primary payer; and (3) with the private right of action and the double damages, the beneficiary can pay back the government for its outlay and still have money left over to reward him for his efforts.

Stalley contends that the statute has to be a *qui tam* statute because under the payment procedures outlined by the statute, Medicare will pay the beneficiary's expenses when the primary insurer fails to pay, and as a result, the Medicare beneficiary will not have been injured by the primary payer's failure to pay and cannot recover anything in his own right. Stalley argues that if the Medicare beneficiary has not been injured, Congress must have intended the private right of action to allow the private plaintiff to sue on behalf of the government, the only injured party. Under Stalley's reasoning, the private right of action is merely an assignment of the government's public right.

We reject the assertion that a Medicare beneficiary could never have an injury of his or her own to vindicate by means of the private right of action. There are two scenarios in which a private plaintiff conceivably could bring suit under the Medicare Secondary Payer statute: either the insurer failed to pay and the government has not paid, or else the insurer failed to pay and the government did pay. In the first case, the plaintiff was obviously injured by

the insurer's failure to pay, but the government has not yet paid any money. This would not appear to be the factual situation which the statute was created to remedy, because in this case, the government would have nothing to recover and therefore would not benefit from the services of the informer/plaintiff. If the first situation were the only one in which the beneficiary could sue, the private right of action would not save the government money. Moreover, in this first factual situation, there would be no need for the double damages incentive; if the government had not paid the expenses, the beneficiary would have an incentive to sue the primary payer even without double damages, to avoid having to pay the expenses him or herself.

In the second case, in which the primary payer failed to pay and the government has paid the expense, has the Medicare beneficiary been injured by the primary payer's failure to pay something the government paid anyway? Triad Hospitals and related defendants argue that a beneficiary whose primary payer refused to pay would have damages even if Medicare paid the beneficiary's expenses because the beneficiary would have to pay Medicare co-payments and deductibles. But as Stalley points out, if those were the beneficiary's only damages, the beneficiary could only recover those amounts, not the amount that Medicare paid on its behalf. The co-payments and the deductible would be costs that are not covered by Medicare, so Medicare would not be entitled to recover those costs from the beneficiary.

Thus, Stalley argues, if the Medicare beneficiary can only recover expenses not paid by Medicare, the private right of action would not help the government recoup anything and it would be completely ineffectual as an aid to Medicare's recovery efforts; this compels the conclusion, he says, that the private plaintiff must be able to assert the government's rights directly, because there is no way the plaintiff's assertion of its own rights would help the government collect any money.

We conclude that Stalley's reasoning is flawed. Congress must have intended that a Medicare beneficiary could sue its primary insurer for expenses Medicare had already paid. There was authority extant in several states when Congress enacted the private right of action in 1986 that a Medicare beneficiary could sue his private insurer and recover his expenses incurred, even if those expenses had already been paid by Medicare. *See Holmes v. Cal. State Auto. Ass'n,* 185 Cal. Rptr. 521, 524 (Cal. Ct. App. 1982); *Black v. Am. Bankers Ins. Co.,* 478 S.W.2d 434 (Tex. 1972); *Niles v. Am. Bankers Ins. Co.,* 229 So.2d 435 (La. Ct. App. 1969). To be sure, there was also authority reaching the opposite conclusion, *e.g., Steffen v. Pac. Mut. Life Ins. Co.,* 442 S.W.2d 142, 144-45 (Mo. Ct. App. 1969) (policy was "not a policy of insurance in the usual sense but one of indemnity," meaning that insurer only agreed to reimburse insured for amounts insured was actually required to pay), but Congress could rationally have expected beneficiaries to be able to recover from their primary payers even if

Medicare has made a conditional payment. Moreover, some courts have interpreted the § 1395y(b)(3)(A) private right of action to authorize a Medicare beneficiary's recovery of expenses that have already been paid conditionally by Medicare. *Manning v. Util. Mut. Ins. Co.*, 254 F.3d 387, 391-92 (2d Cir. 2001) ("To encourage compliance with [the primary payment] requirements, Congress has authorized a private cause of action and double damages against entities designated as primary payers that fail to pay for medical costs for which they were responsible, which are borne in fact by Medicare."); *O'Connor v. Mayor & City of Baltimore*, 494 F. Supp. 2d 372, 374 (D. Md. 2007) (plaintiff had standing under § 1395y(b)(3)(A) because he averred that he had suffered injury for which City owed but failed to pay worker's compensation and Medicare had been forced to pay his expenses); *Collins v. Allstate Indem. Co.*, 626 A.2d 1162, 1166-67 (Pa. Super. Ct. 1993) (Medicare beneficiary had standing because "the plaintiffs allege a contractual right to the benefits owed, regardless of any independent claim to those benefits asserted by the United States."), *aff'd*, 660 A.2d 50 (Pa. 1995). The idea that Congress expected the beneficiary to be able to sue to vindicate his or her own contractual and tort interests is bolstered by the fact that the beneficiary's expenses will have only been paid "conditionally" by Medicare, § 1395y(b)(2)(B)(i), which leaves the beneficiary with less than a final settlement of his or her liability to the health-care providers.

On the other hand, the Third Circuit in *Wheeler v. Travelers Ins. Co.*, 22 F.3d 534, 538-39 (3d Cir. 1994), dismissed for lack of standing a Medicare beneficiary's suit against her primary insurer because her expenses had been paid by Medicare. Similarly, in *In re Guidant Corp.*, 484 F. Supp. 2d at 979-80, the plaintiff was a Medicare beneficiary allegedly harmed by the defendant's tort; she sued under § 1395y(b)(3)(A), but she conceded that she had no injury in fact from the alleged tortfeasor's failure to pay for her medical treatment because Medicare in fact paid for the treatment. The court dismissed her claim against the alleged tortfeasor for lack of standing because the Medicare beneficiary was not injured in light of the fact that her expenses were paid. *Id.* at 980-81. *Wheeler* was distinguished in *Brooks v. Blue Cross & Blue Shield,* No. 95-405, reproduced as appendix at 116 F.3d 1365, 1377 (S.D. Fla. 1995), *aff'd on other grounds,* 116 F.3d 1364 (11th Cir. 1997), because *Wheeler* was brought under state insurance laws and not under the Medicare Secondary Payer statute.

Our study of the Medicare Secondary Payer statute convinces us that Congress contemplated that Medicare beneficiaries could recover double damages to vindicate their private rights when their primary payers fail to live up to their obligations, even if Medicare has made a conditional payment of the beneficiaries' expenses. Therefore, there is no need to read the statute as permitting a plaintiff to assert the public's rights in contravention of the plain language

creating a private right of action. Moreover, if the private right of action statute were read as assigning the government's claim against a primary payer to a volunteer, if the beneficiary retained his or her tort or contract rights against the primary payer, the primary payer would effectively be liable for treble damages, not double; nothing in the statute or legislative history indicates Congress foresaw this extremely punitive result. Accordingly, we reject Stalley's argument that Congress created the private right of action to permit private persons to assert the government's rights, rather than their own, for we conclude that Congress rationally could have intended § 1395y(b)(3)(A) to provide Medicare beneficiaries a cause of action against their defaulting primary payers, with the anticipation that a portion of the beneficiary's recovery would be paid to reimburse Medicare.

With the demise of his principal argument, Stalley's case quickly crumbles. Stalley relies on the regulations that require a beneficiary whose expenses have been paid by Medicare and who then receives a payment from a primary payer to reimburse Medicare. 42 C.F.R. §§ 411.20 & 411.37. He contends that these regulations indicate the statute is a *qui tam* statute since they show that the proceeds will be split between the plaintiff and the government. Far from showing that the proceeds result from the plaintiff asserting the government's rights, the regulations are consistent with the idea that the Medicare beneficiary asserts his or her rights against the primary

payer and the government then asserts its own rights against the beneficiary, see § 1395y(b)(2)(B)(iii).

In sum, the private right of action provided by 42 U.S.C. § 1395y(b)(3)(A) is not a *qui tam* statute, and Stalley, who is a volunteer and who lacks any injury in fact, does not have standing to pursue such an action.

Stalley contends that the district court should have allowed him to replead, but in view of the fact that he has not indicated any amendment he could make that would cure the defect in his complaint, the district court correctly denied permission to replead as futile.

Stalley's motion to strike the Appellees' appendices in No. 06-4121 is denied.

We affirm the district courts' dismissal of the complaints.